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IN THE

Supreme Court of the United States.

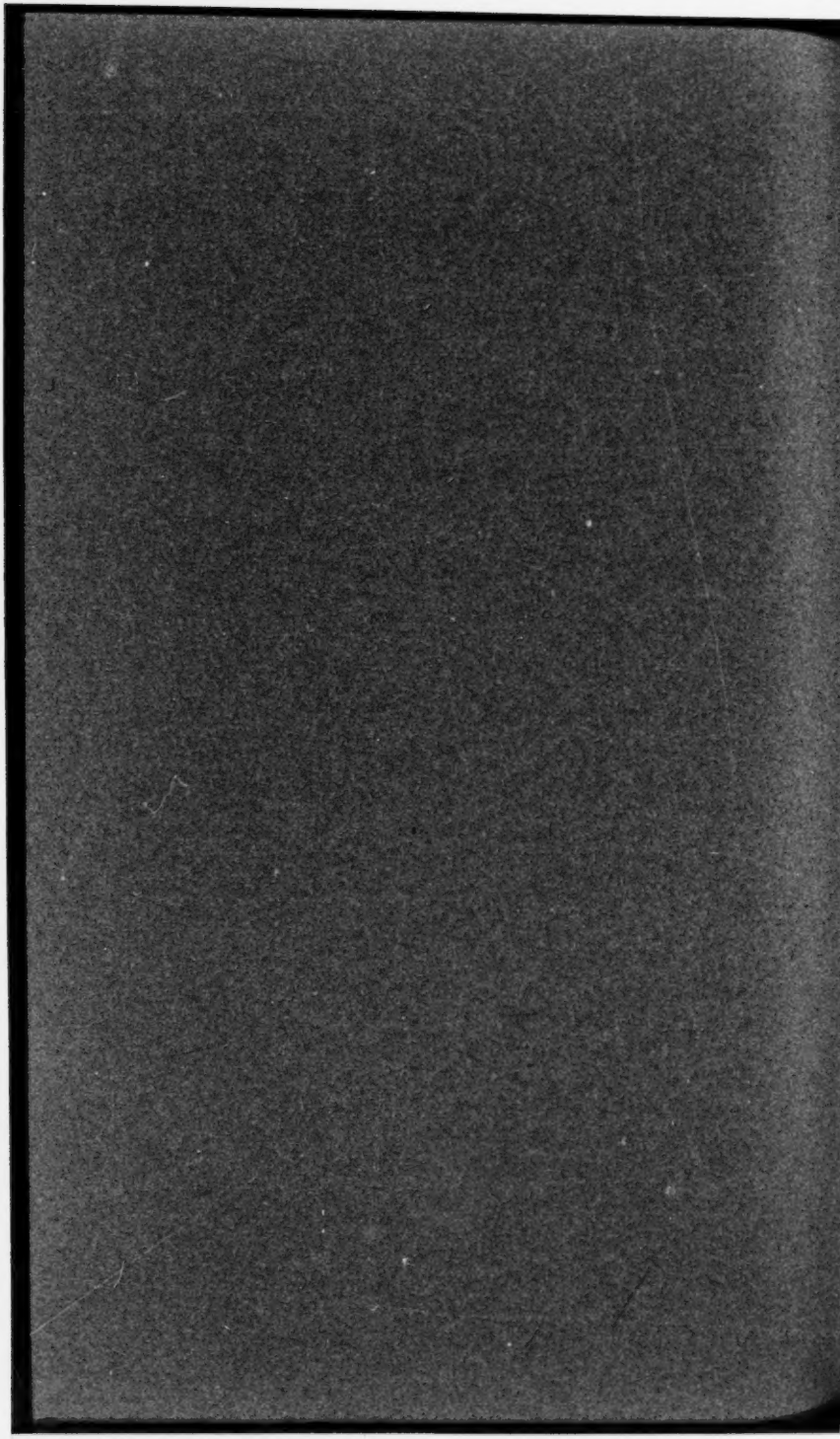
OCTOBER TERM, 1900.

THE UNITED STATES, *Appellants,*
v.
WILLIAM EDMONSTON, *Appellee.*
No. 353.

Appeal from the Court of Claims.

BRIEF OF ARGUMENT ON BEHALF OF APPELLEE.

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Attorneys for Appellee.



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Supreme Court of the United States.

THE UNITED STATES, *Appellant*,
v.
WILLIAM EDMONSTON. } No. 353.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

This case is an appeal by the United States from a judgment of the Court of Claims in favor of the appellee for $200, being the excess of $1.25 per acre overcharged the appellee on a pre-emption entry in Wisconsin in 1891 by the officers charged with the execution of the land laws. The appellee was required to pay $2.50 per acre for 160 acres, in order to secure the allowance of his entry and the subsequent issuance of the patent for the land, while the legal price of the land was but $1.25 per acre. It is now admitted by the Interior Department, and by counsel for the United States, in their brief, that the charge of $2.50 per acre instead of $1.25 per acre was an illegal charge, because of the fact that the price of the land in question was fixed at $1.25 per acre by the act of June 15, 1880, and the only defense now made to the action is by the contention: 1st, that the Court of Claims has not jurisdiction; and, 2d, that the payment was voluntarily made, and that, therefore, there is no right to recovery.

The Payment Was Compulsory.

The record of this case, and the decisions of this and other courts completely controvert the claim that this is a case of voluntary payment.

The record shows that upon the 11th day of March, 1891, the appellee filed a pre-emption declaratory statement for the land in question, declaring his intention to pre-empt, that is, to make entry of the land, within the time limited by law by paying the legal price for the land.

The form of the declaratory statement is not given in the findings, as it was not essential, but it must have been substantially as follows; this being the prescribed form:

"Declaratory Statement for Cases where the Land Claimed is Subject to Private Entry.

"I——of———, being———, have since the first day of——A. D. 18—, settled and improved the—— quarter of section No. —— of range No. —— in the district of lands subject to sale at the land office at ——, containing —— acres, which land had been rendered subject to private entry prior to my settlement thereon; and I do hereby declare my intention to claim the said tract of land as a pre-emption right, under section 2259 of the Revised Statutes of the United States.

"Given under my hand this——day of——A. D. 18—

"In presence of ——."

Having settled upon the land, and filed this declaratory statement announcing his settlement, appellee proceeded to comply with the law by cultivating and inhabiting the land. He lived upon the land for the required period and built a dwelling thereon. See Finding 1.

Having complied with the law, appellee became entitled to make formal entry of the land upon payment of the minimum price for the land. See section 2259 R. S.

Indeed this right to enter at the minimum price is the sole right that can be acquired under the pre-emption law. That law gives to the settler the preferred right to enter the land upon payment of the price which was assigned to the land by law.

This land having been raised to $2.50 per acre and put on the market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes (Finding No. 5), was such land as was described by the act of June 15, 1880, and was by that act reduced in price to $1.25 per acre, and remained at that price both on the 11th day of March, 1891, and on the 11th day of November, 1891, when the appellee made payment for the land.

It appears from the record, Finding No. 2, that the appellee *was required* to pay $2.50 per acre for the land, instead of the $1.25 per acre fixed by the act of June 16, 1880.

He had to pay the price demanded by the officers of the land office or lose not only the land, but the improvements, including the dwelling that he had erected upon the land. The land officers held that the price of the land was $2.50 per acre. Sections 2264, 2265 and 2266 provide that where payment is not made for the land within the time fixed by law, which in this case was twelve months, "the tract of land so settled and improved shall be subject to the entry of any other purchaser."

So that, if appellee had not paid for the land what was demanded, he would not only not receive a certificate of entry himself, but his land and his improvements with them would be subject to the entry of any other purchaser. A tender of $1.25 per acre would have availed nothing. Under the ruling as to these lands, this would not have been the payment of the legal price, and his entry would not have been allowed. An appeal to the Commissioner

and the Secretary would have availed nothing, for these officers had already ruled that the price was $2.50 per acre. An appeal to the courts was an impossibility, because this court has held in Johnson *v.* Towsley (13 Wall., 72) and other cases, that the courts would not interfere with the executive officers in discharge of their duties, by injunction, mandamus or otherwise, while the legal title remained in the United States. Appellee had, therefore, no means of relief from this payment. He had no alternative but that of giving up his enterprise, involving the loss of the land, of his dwelling, and of the time and labor he had spent in developing the property. In other words, he was *compelled* to make the payment of the sum demanded of him by those in authority.

The record does not show that appellee filed a protest against the overcharge, and upon this absence of a protest counsel for the United States bases his claim that the payment was a voluntary payment; that both parties to the transaction mistook the law, and believed that the legal price was $2.50 per acre.

No protest, however, was necessary to preserve his right to bring suit against the Government for an overcharge, and a protest and notice of intention to bring such a suit might have had a tendency to prejudice the land officers against the entry. After an entry is allowed by the local officers, the papers in the case are sent to the Commissioner for approval, and for the issuance of a patent. The Commissioner has the right to cancel an entry, if he does not consider the evidence to be sufficient, and this right is frequently exercised. It may be that the appellee did not wish to raise any obstacles to the prompt issuance of a patent; or it may be that he realized that a protest would do no immediate good. Whatever his reasons, the absence of a protest, which was not required by law, is no proof that the appellee willingly paid $200, when the

price was but $1.25 per acre. He paid the double price because he was required to do so to preserve his rights. Other entrymen were required in the same way to pay the double price. There are now pending in the Court of Claims about seventy-five cases of the same kind where the double price was charged. In some of these cases protest was made. In others, protest was not made. The compulsion was the same in both classes of cases. The entrymen all paid because they had to, in order to obtain the right of pre-emption granted them by Congress.

The case of John Baxter, reported in Vol. 11, p. 99, of P. L. D., discloses the ground which the department assigned for charging $2.50 per acre for this land. Baxter made entry August 14, 1889, and was charged $2.50 per acre for his land, and soon afterwards applied for repayment of the excess of $1.25 per acre. The Secretary on July 25, 1890, reiterated the previous holding of the Department that the price of such lands was $2.50 per acre. He said:

"The land having been raised to double minimum prior to January, 1861, was by the terms of the act reduced to one dollar and twenty-five cents per acre; but subsequently it fell within the limits of the grant to the Northern Pacific Railroad Company, by definite location, made July 6, 1882, and by reason thereof was again raised to two dollars and fifty cents per acre."

It thus appears that since July, 1882, it had been held by the Department that the price of lands situated like the appellee's land in relation to railroad grants was $2.50 per acre, and this was the construction at the time the appellee paid for his land. Under these decisions the appellee *was required*, as the Court of Claims finds, to pay $2.50 per acre instead of $1.25 per acre.

The existence of this long-continued ruling absolved these entrymen from the obligation of filing a protest in

each case, if any obligation to file such protest can be conceived to exist in any case where an illegal charge is exacted. The facts were the same as in the Swift case, 111 U. S., 22–31, in which the court said:

"From this statement it clearly appears that the Internal Revenue Bureau had at the beginning deliberately adopted the construction of the law, upon which it acted through its successive Commissioners, requiring all persons purchasing such proprietary stamps to receive their statutory commissions in stamps at their face value, instead of in money, and it regulated all its forms, modes of business, receipts, accounts and returns upon that interpretation of the law; that it refused on application, prior to 1866, and subsequently, to modify its decision: that all who dealt with it in purchasing these stamps were informed of its adherence to this ruling; and, finally, that conformity to it on their part was made a condition without which they would not be permitted to purchase stamps at all. This was in effect to say to appellant, that unless it complied with the exaction, it should not continue its business, for it could not continue its business without stamps and it could not purchase stamps, except upon the terms prescribed by the Commissioner of Internal Revenue. The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

"We can not hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *Volenti non fit injuria.* * * *

"No formal protest, made at the time, is, by statute, a condition of the present right of action, as in cases against the collector to recover back taxes illegally exacted; and

the protests spoken of in the findings of the Court of Claims as having been made prior to 1866 by manufacturers of matches and others requiring such stamps, are of no significance, except as a circumstance to show that the course of dealing prescribed by the Commissioner had been deliberately adopted, had been made known to those interested and would not be changed on further application and that, consequently, the business was transacted upon that footing because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character, deliberately adopted, and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced. This principle was recognized and acted upon in U. S. *v.* Lee, 106 U. S., 196–200, where it was held that the officers of the law, having established and acted upon a rule that payment would be received only in a particular mode, contrary to law, dispensed with the necessity of an offer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right."

This decision of the Supreme Court is conclusive upon this question.

Where the parties are not on equal terms, where the position of the parties is such that one party can make a demand of another party for the performance of certain duties, when the demand was unauthorized, the money paid in response to such a demand is not a voluntary payment, and the absence of a protest is no proof that the money was voluntarily paid. In the case of the Bank of the United States *v.* Bank of Washington, 6 Peters, 8, this court said :

"Where money is wrongfully and illegally exacted it is received without any legal right or authority to receive it; and the law at the very time of payment creates the obligation to refund it. A notice of inten-

tion to recover back the money does not even in such cases create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake."

In U. S. *v.* Lawson, 101 U.S., 164–169, the court said:

"Suppose that is so; still it is contended by the United States that the payments were voluntarily made, and that the money can not be recovered back. Confessedly the order was official and peremptory, and under such circumstances it may be inferred that the party felt that if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of his office. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we can not hold the payments were voluntary within the meaning of the judicial rule, which, in consequence of the payment, denies to the party making the same the right to recover it back."

In the similar case of U. S. *v.* Ellsworth, 101 U. S. 170, this court said, after quoting sections 3617 and 3619 R. S.:

"Viewed in the light of these penal provisions the payments in question, made under the peremptory order of the Commissioner, can not be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

In Steele *v.* Williams, 8 Wels. Hurl. & Gordon, 625, Martin, B said:

"If a statute prescribes certain fees for certain services, and a party, assuming to act under it, insists upon having more, the payment can not be said to be voluntary."

Tutt *v.* Ide, Blatch., 3, p. 249:

"The general rule is that an action for money had and received lies whenever money has been received by the defendant which in *æquo* and *bono* belongs to plaintiff."

"Where A, a common carrier, agreed with B to convey goods at a specified rate for freight, and then refused, at the place of destination, to deliver the goods except upon payment of freight at a higher rate and B in order to obtain possession of the goods paid to A the sum demanded; *Held*, that the payment was not voluntary, and that the excess beyond the agreed freight might be recovered back."

In this decision the court referred to the case of Shaw *v.* Woodcock, 7 Barn. & Cress., 73, where it was held:

"That a payment made in order to obtain possession of goods or property to which a party was entitled and of which he could not otherwise obtain possession at the time was a compulsory and not a voluntary payment and might be recovered back."

There was no mention of a protest having been made, or as being necessary, in Tutt *v.* Ide.

In Ogden *v.* Maxwell, 3 Blatch., 319, it was expressly held that a protest was not necessary.

The report says:

"This was an action against the defendant as Collector of the port of New York to recover back money paid under the following circumstances: The plaintiffs were owners of the ship *Racer*. She arrived at New York from Liverpool in November, 1851, with 709 steerage passengers and their wearing apparel and other personal baggage and tools of trade. Only one permit for the examination and landing of the baggage of all the passengers was

issued by the Collector, but he demanded pay for 154 permits, being one permit for every five passengers at the rate of twenty-five cents for each permit, being $30.80 in all. The plaintiffs paid this amount in order to obtain one permit. In each case the money was paid without any written protest being made.

"It is not necessary to the maintenance of a civil action for the recovery of money wrongfully collected that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in exacting the payment. It is well sustained, if his official power was exercised in the collection without warrant of law. Maxwell *v.* Griswold, 10 How., 242.

"The payment was compulsorily obtained in this instance and they are entitled to charge the collector with the amount notwithstanding he received it for and paid it to the Government. Ripley *v.* Gelston, 9 Johns. 201.

"Any charges or costs illegally exacted by an officer, *colore officii*, may be recovered back from him by the common-law action of *indebitatus assumpsit*. Clinton *v.* Strong, 9 John., 370.

"We do not think that the act of February 26, 1845, 5 U. S. 727, applies to exactions of this character. The terms of that act, requiring notice in writing to be given to the Collector of objections made to payments exacted by him, are expressly confined to duties paid. In all other respects the parties stand upon their common law rights and liabilities and under those the action in this case well lies, although the fees collected by the defendant were paid into the treasury before suit was brought."

In Clinton *v.* Strong, 9 Johns., 370, the court said:

"The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the redelivery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment precluding the party from contesting it afterwards."

The brief for appellant, however, ignores all these principles and the inequality of the situation of the par-

ties, and the finding of the court that the payment was required by the land officers, and seeks to make out a case of payment under a mutual mistake of law, basing the argument upon the groundless assumption that the appellee paid the sum demanded of him because he believed that he ought to pay it. There is no evidence or finding whatever upon which to base this assumption. In fact it is completely negatived by the finding of the court that he was required to pay the sum demanded in pursuance of the settled ruling of the Department.

This assumption is also opposed to that principle of law which presumes that every man knows the law, and holds him responsible for that knowledge. Presuming, as we are bound to do, that appellee did know the law, it becomes more apparent still that the payment was made under compulsion, for no man, knowing that he had the right to enter a tract on payment of $1.25 per acre, would willingly pay $2.50 per acre for it, unless, as in this case, he had no choice in the matter.

But upon this baseless and wholly untenable assumption the principal portion of appellant's argument is based. With the cases cited in the brief or with the principles laid down by them we have no quarrel, as they simply serve to show by way of contrast the compulsory character of the payment in this case. In the case cited, for instance, of Corkle *v.* Maxwell (3 Blatch., 413), the case was entirely different in that the payment was not made to secure a right to which the plaintiff was entitled without such payment. The court held that the plaintiff had no legal right to have his warehouse designated as a public warehouse. That such designation was a matter of favor or discretion on the part of the Secretary, and that any payments made in fulfilment of conditions imposed by the Secretary could not be recovered. The citation is perhaps unfortunate for the

appellee for the reason that the court further expressed the opinion that—

"When a payment has been obtained by fraud, oppression or extortion, or when it has been made to secure a right which a party paying was entitled to without such payment and which right was withheld by the party receiving the payment until such payment was made, such payment was not voluntary and may be recovered back."

Brisbane *v.* Dacres is a perfect example of a voluntary payment, and of a payment made under a mistake of law. Admiral Dacres had no control over the person or property of Captain Brisbane and could exercise no legal pressure upon him to compel the payment of the sums paid. The payments were made by Brisbane in the full belief that he was obliged by law to make them, and the suit for the recovery was brought upon the ground that the payment was made in mistake of law. In this case appellee denies that he made the payment under any mistake or misapprehension of the law, and he does not bring his suit upon that ground. He had no opportunity to judge for himself what the law was, as Brisbane had, nor did he have any opportunity to defend himself in court against the demand of the law officers, in the first instance, as Brisbane had. The mistake, if it can be called a mistake, where a department misconstrues a law, and forces its misconstruction upon a citizen, was entirely the mistake of the law officers, and not the mistake of the appellee, or the mutual mistake of both parties. In the cases we have cited the courts have distinguished between payments forced by a party in control of the person or property of another, and cases of real mutual mistake of law. Where the construction of the Department has been forced upon a citizen the Supreme Court has said, in U. S. *v.* Ellsworth, above

quoted, "Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

And so with the other cases mentioned in appellant's brief. Not one of them tends to unsettle the rulings we have referred to on the question of compulsory payments, or serve to introduce a doubt as to what the law is. The case of Waples *v.* The United States, 110 U. S., 630, is entirely beside the mark. That case simply held that where a purchaser at a marshal's sale bought the title of the United States to a certain piece of property, and it subsequently turned out that the United States had no title whatever, the purchaser could not sue the United States for the recovery of the purchase money on the ground of failure of consideration. The purchaser obtained what he bought, though not what he thought he had bought. He took the risk and obtained all the title of the United States, which was all the United States undertook to sell him. While he lost by the transaction the United States was under no legal or moral obligation to save him harmless. The case plainly has no application to the case at bar.

In the case of United States *v.* Wilson, 168 U. S., 273–276, there was a lack of the element of compulsion shown in the Lawson, Ellsworth and Swift cases, and in the case at bar. There appeared in that case no ruling by the head of the Department, no demand upon the claimant by his superior officers that he should account for the fees mentioned. The fees were not paid to avoid a controversy with any department. As the court said: "This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory orders of a

superior officer; nor a payment under duress." The facts shown did not bring the case within the ruling in the Ellsworth and Lawson cases, or within the Swift case. Had the findings of the Court of Claims shown that the payments had been *required* by the officers of the Treasury in pursuance of the long-settled rulings of the Department, the ruling of the Supreme Court would doubtless have been different, since its decision was based entirely on the absence of such findings by the Court of Claims.

In the two cases of Lambourne *v.* County Commissioners (97 U. S. 181), and Railroad Co. *v.* Commissioners (98 U. S. 541) there was also a lack of the essential element of compulsion. These were both cases where illegal taxes were paid and a suit afterwards brought for recovery of the amount paid. The distinction is evident between the payment of a tax and such a payment as was made in the case at bar. An illegal tax can not be enforced, and is not a cloud upon the property. Consequently a payment of such a tax, when its payment could be resisted in the first instance, is a voluntary payment, since the tax could not have been enforced against the property. In Railroad Co. *v.* Commissioners the court said:

"The real question in this case is whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made under compulsion. The Treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. No attempt was made by the Treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim was made known to him."

The decision in Elliott *v.* Swartwout, 10 Peters, 137–152, applied directly to a customs case, in which protest made at the time of the overcharge complained of has always been required by the courts and by positive statute law. The reason why a protest was considered necessary in that class of cases, when only the collector and not the Government was suable, is given by the court as follows:

"To make the collector answerable, after he had paid over the money without any intimation having been given that the duty was not legally charged, can not be sustained upon any sound principles of policy or law. There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim indemnity from the Government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the Government to indemnify him against the suit."

It is evident that customs cases are a class by themselves and that the reasons which make a protest absolutely necessary in such cases have no application to other cases. The questions arising in the administration of the customs laws are so delicate, with such subtle shades of difference, that it is absolutely necessary that the Treasury have notice when one of its rulings is to be disputed, in order that the evidence may be preserved. This necessity has crystallized into positive law, regulating the form and time for filing protests, and creating a separate jurisdiction for the trial of such causes, apart from other claims against the Government. So that decisions which are perfectly necessary and proper in customs cases have never been considered applicable to other classes of cases.

Counsel for appellant practically assumes that there was no exercise of power, either actual or threatened, in the case at bar; that the simple proposition was before appellee whether to buy land offered for sale at $2.50 per acre, and that he accepted the offer and purchased the land. On the first branch of this proposition it is sufficient to quote the language of this court in Maxwell *v.* Griswold, 10 How., 243, where the court said:

"Now, it can hardly be meant in this class of cases, that to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of the illegality, and without being able to regain possession of his property except by submitting to the payment."

Nor did the appellee ever bargain or contract for the land at the rate of $2.50 per acre. He made a filing on the land, made his improvements and cultivated the soil, under a law which permitted him, after performing these conditions, to buy the land by paying $1.25 per acre for the same. He entered into no contract or agreement to pay the $2.50 per acre. He did nothing but pay the $2.50 per acre because it was demanded of him, and because he had no choice, reserving all rights to bring suit in the Court of Claims for the amount of the illegal exaction. He is not seeking to re-open any closed transaction on the ground of inadequacy of consideration. The adequacy or inadequacy of consideration has nothing to do with this case. Officers of the United States have illegally exacted of appellee the sum of $200, to which the United States has no claim, and he is simply seeking to get back money that belongs to him and which the counsel for appellant now admits should never have been demanded of him. While on

this part of our subject we may as well call attention to the fact that the Department has never considered such an entry a closed transaction, where less than the legal price has been charged, and there are great numbers of cases where sums additional to the original payment have been demanded and where if the demand was not complied with the entries have been cancelled. See cases of Moses Stern, p. 1393, Vol. 2, Copp's Land Laws; Harvey J. Judd, p. 507, Vol. 6, P. L. D.; Charles P. Bedell, p. 495, Vol. 7, P. L. D.; Henry McCrea, Vol. 7, p. 578, P. L. D.

The case of Frederick W. Lawrence, Vol. 23, P. L. D. p. 450, is a case of this kind.

Lawrence made a desert-land entry in California in 1877, under the act of March 3, 1877, paying 25 cents per acre as initial payment, and receiving a certificate to the effect that upon payment of $1 per acre additional he would be entitled to receive a patent.

His entry was soon afterwards suspended, and suspension was not removed until 1891 or 1892. He made final proof and made final payment for the land January 17, 1896. In 1887 the Department changed its rulings of the ten years before and held that the legal price of such lands was $2.50 per acre, and this ruling was upheld by the Supreme Court in the case of Benj. Healey, 160 U. S., 136. On April 23, 1896, Lawrence was called on for an additional $1.25 per acre, and the Department held in the decision cited that he must pay the additional $1.25 per acre, notwithstanding that when he entered the land it was understood that he was to pay but $1.25 per acre for the land, and he held a certificate to that effect. In the Lawrence case too little was charged by the local officers, and he was compelled to pay the difference, although he had the highest equitable claim to enter the land at $1.25 per acre. We thus see that an entry is not

a final adjudication, unless actually in accordance with the law, and there is no more reason why an entryman should be concluded by the price paid, than that the Government should be.

Congress has fixed a price upon every acre of the public lands. No part of the public domain is subject to the will of the Secretary of the Interior in the matter of price. That has always been a matter fixed by law. To allow the officers of the Land Office to charge what they will, and to refuse to repay an illegal exaction, as contended for in appellant's brief, is to substitute for the will of Congress the will of the executive officers.

In the eye of the law the Secretary of the Interior has no more power to legislate upon the question of price of land than the humblest citizen; yet if the contention of appellant were to be sustained, he would in effect be given that power; for if he can fix an extra-legal price for one kind of lands, he can for all, and if the courts will not decree the return of the amounts illegally exacted, then it is the same for every practical purpose as if he had the law-making power; for his actions will have been enforced by the courts, instead of the will of Congress.

The Defense of Voluntary Payment in this Case is Exceptional and Opposed to the Entire Policy of the Government.

In the act of June 16, 1880, Congress has recognized that the Government is responsible for overcharges that may arise in the administration of the land laws, and has directed the repayment of the overcharge in cases exactly similar to this in principle.

One part of this act reads:

"In all cases where parties have paid double minimum price for land which has afterwards been found not to be

within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall be repaid to the purchaser thereof or to the heirs or assignees."

This law is applicable to mistakes of law on the part of the Government, as well as to mistakes of fact, and has been so administered.

In the case of M. F. Soto, Vol. 6, P. L. D., p. 384, repayment of the double minimum excess was directed where the double minimum had been charged on account of the Atlantic & Pacific grant from San Buenventura to San Francisco. The Department held on the 23d of March, 1886, 4 L. D., 458, that the Atlantic & Pacific Company had no grant between the said places. This was purely a question of law, and the charge of the double minimum price had been purely an erroneous construction of the law, just as in this case. Yet repayment was directed under the act of June 16, 1880. In course of the opinion Secretary Lamar used this language:

"One dollar and twenty-five cents per acre is all the Department was authorized to EXACT from them when final proof was made."

We quote this as a recognition of the fact that the Department is the authority that construes the law, and determines what the law requires to be paid for land. This power is such that Secretary Lamar denominated it an "Exaction."

Another case of payment of the $1.25 per acre, where the local officers had not observed the law, is shown in the case of Jacob A. Guilfoil, Vol. 8, p. 583.

The act of March 2, 1889, 25 Stat. 854, had reduced the price of certain lands from $2.50 to $1.25 per acre. On April 22, 1889, Guilfoil had made final proof and payment at the rate of $2.50 per acre. Secretary Noble directed the repayment of the excess of $1.25 per acre in the following language:

"It appears that this entry was made before the receipt of the instructions of your office by the local officers, but at the time payment was made for the land, the land had been reduced in price to one dollar and twenty-five cents per acre, and therefore the sum of two dollars and fifty cents per acre was erroneously charged."

Here is another instance of recognition of the fact that the price paid by the entryman is always the price fixed by the Government officers. The Government is responsible for the charge. The error of the local officers was an error of law. They had not been apprised of the reduction of price, and hence erred as to the law in demanding and receiving the $2.50 per acre. Counsel for the United States would characterize this as a case of mistake of law, without the right to repayment: yet Congress had anticipated such a case, and recognized the obligation of the Government to refund, and this obligation was carried out by the Secretary without question.

The case of Thomas Kearney, Vol. 7, p. 29, is to the same effect. Secretary Vilas there said:

"Kearney made cash entry October 14, 1885. At the time the price of the land was $1.25 per acre. He was erroneously charged $2.50 per acre, and paid $200 more than he should have paid.

"When the entry was made and double minimum price paid for the land it was not, and since the date of forfeiture had not been, within the limits of a railroad grant. It had ceased to be double minimum land and when the local officers charged $2.50 per acre they not only disregarded the terms of the letter of instructions above referred to but the following language in the act forfeiting the grant. * * * I therefore reverse your decision and direct the repayment to Thomas Kearney of the excess of one dollar and twenty-five cents per acre overpaid by him on his pre-emption cash entry No. 2377."

The error in this case was merely an error as to the law made by the local officers. There was no question at all as to the location of the land with respect to the grant.

There are many other reported cases of the same kind, and they have been followed in the administration of the law in hundreds and probably thousands of cases. The Government has recognized its responsibility in the matter of the overcharge, and has made repayment wherever it could find legal authority to do so. Money can only be taken out of the Treasury by authority of law. There was no express authority or appropriation for payment of the overcharge except where the land was outside of the grant, so that the Secretary has never been able to afford relief in cases like this. But he has always recognized that whatever price was paid was paid on account of having been fixed by the Government officials, in construing the law, and has never sought to throw the responsibility of construing the law, or of any errors that have been made upon the humble entrymen who were seeking to acquire homes on the public lands.

This fact was recognized also in the case of Frank A. White, Vol. 17, P. L. D., p. 339, in which repayment was refused on the ground that the Secretary had no legal authority to make it.

It is recognized, however, that the excessive price was erroneously charged by the Government.

The syllabus says:

"There is no authority for the repayment of double minimum excess charged erroneously required under a desert land entry of an even section within the limits of a railroad land grant."

The decision says:

"The land was within the granted limits of the Northern Pacific Railroad and the local officers required him to pay fifty cents per acre at the time of his application.

"On the 28th of November, 1891, he made final proof and completed his entry, when he was required to pay an additional sum of two dollars per acre, making $2.50 per acre. * * *

"Under the facts in the case and the Act of March 3, 1877, as amended by the Act of March 3, 1891 (26 Stat., 1095), fixing the price of desert land entries at $1.25 per acre, without regard to the situation of the land with relation to the limits of railroad grants, there is no question but that White was required to pay $400 too much for the land.

"As there is no statute in existence empowering the Secretary of the Interior to make repayment in cases of this character, your decision is affirmed."

It is interesting to note that in this case the claimant carried his case into the Court of Claims, obtained judgment there for the sum of $400 and that no appeal was taken from this judgment, and the same was paid.

We are able also to cite a case identical in every respect with that of appellee in which the Secretary of the Interior directed the return of the overcharge.

We refer to the case of Albert Nelson, Vol. 28, P. L. D., p. 248.

The syllabus of the case states:

"The repayment act of June 16, 1880, does not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by section 3, act of June 15, 1880; but where the consideration received by the Government is in the form of surveyor general's scrip, and yet remains in the custody of the Department, the error may be corrected by a return of scrip equal in amount to the excess."

The decision says:

"Sept. 14, 1895, Albert Nelson commuted his homestead entry, embracing the s. w. ¼ of section 34, tp. 51 n., tr. 5 w., Ashland, Wisconsin, surrendering in payment therefor three certificates of location issued by the United States Surveyor-General for the State of Louisiana and described as follows: Respectively '332 B' for one hundred and sixty acres; '401 H,' for eighty acres, and '646 I' for eighty acres; thereby paying double minimum price for the land covered by the entry.

"Sept. 17, 1897, he filed in the local office an application for repayment of the excess. His application was transmitted to your office and upon examination of the record was denied Sept. 28, 1897. His appeal from this action of your office is now here for consideration.

"An examination of the records of your office show that the land was offered at public sale at $2.50 per acre June 22, 1859.

"The third section of the Act of June 15, 1880, provides:

"That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, 1861, by reason of the grant of the alternate sections for railroad purposes is hereby reduced to $1.25 per acre.

"The land is within the limits of the grant to the Chicago, St. Paul, Minneapolis, and Omaha Railway Company, Bayfield branch, the map of definite location therefor having been filed July 17, 1858, and it was by reason of said grant that the land was raised to the double minimum price. It therefore falls within the description of lands affected by the said Act of June 15, 1880, and was thereby reduced to one dollar and twenty-five cents per acre. The *exaction* of a double minimum price was error. Can it be corrected?

"The application does not come within the remedy prescribed by the second section of the Act of June 16, 1880, because Nelson's entry has not been canceled, nor was it erroneously allowed, and it may be confirmed; nor has it 'been found not to be within the limits of a railroad land grant.' So that had he paid for this land in money,

and the money so paid had reached the Treasury, the said act would not authorize the Secretary to 'draw his warrant upon the Treasury for the excess so erroneously paid.' (See Inez Rhodes, 27 L. D., 47; William Edmonston, 20 L. D., 216.)

"In the case at bar, however, the consideration received by the government has not been covered into the Treasury, but is still in the hands of the officers of this Department and the matter may be adjusted independently of the statute invoked.

"Through the error of the register and receiver he has paid for this land double the amount required by law. It was wrong to exact this, and to retain it would be to continue the wrong. While the consideration remains in the hands of this Department the mistake may and should be corrected. * * *

"The certificates surrendered by the applicant as the consideration for the land are in the custody and under the control of the Department, and justice and equity demand that the mistake should be corrected.

"You will, therefore, return to the applicant certificates with proper endorsements thereon, representing an amount equal to the excess paid by him for the land."

We have quoted this case fully for the reason that it is identical in every way with the case at bar with the exception that the payment was made by surrendering Surveyor-General's certificates instead of in money. The Secretary said that it was wrong to "exact this, and to retain it would be to continue the wrong." Yet to continue the wrong is the very object of the prosecution of the appeal.

We have thus shown from decisions of this court, from inferior courts, and from the decisions and admissions of the executive department in which this class of cases originated, that the money was overcharged the appellee, and that the repayment of overcharge is due; that to continue to retain it would be to continue the wrong of the original exaction. The payment was in no degree vol-

untary, but was compulsory, in every sense of the word, and there can be no doubt that the appellee is entitled to judgment for the money overcharged.

The Question of Jurisdiction.

One portion of appellant's brief deals with the jurisdictions of the Court of Claims and asserts that that court has no jurisdiction in implied contracts, where a promise to pay is implied by law. In reply we have only to say that the jurisdiction of the court has been uniformly recognized in this class of cases by the Court of Claims and by this court. A notable case is that of United States *v.* State National Bank, 6 Otto, 30–36, where the court said, according to the syllabus:

"Where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property can not be held by the United States against the claim of the wronged and injured party."

In the opinion the court said:

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. Their sovereignty is in no wise involved."

The meaning of implied contracts was well known to those who drafted the jurisdictional act, and they must be taken to have meant what was then and still is generally meant by that phrase.

The fact that some authors now designate a certain class of implied contracts by the phrase *quasi contracts* can not take away from the well-settled jurisdiction of the Court of Claims. In fact it would be curious to hold that the Court of Claims had no jurisdiction in this class of cases. Suppose that an entryman pay for certain lands

and it is found that the Government has already parted with its title and the entry fails. Under the contention of counsel in this brief, in the absence of some such act as the Act of June 16, 1880, the entryman would have no remedy for the purchase money in the Court of Claims. The claim would simply be an equitable or moral one, which Congress had withheld from the jurisdiction of the court.

We think it is unnecessary to further answer the brief of appellant upon this point for the reason that his contention is plainly opposed to the decisions of this court ever since the act of 1887 became a law, in assuming jurisdiction and affirming judgments rendered under authority of the phrase to which he refers.

We may say, however, that this claim is not only founded upon an implied contract to repay the overcharge, but it is also founded upon a law of Congress, the Act of June 15, 1880. Under that act the appellee was authorized to obtain title to this land upon payment of $1.25 per acre. His rights under that law were taken away from him by officers of the Government, though not by Congress or the Government itself, and it is to enforce his rights under that law that this suit is brought. The right is founded upon that law, just as in the case of Tutt *v.* Ide, 3 Blatch., 249, to which we have referred, the claim was based primarily upon the contract. The only way to enforce appellee's right to make entry at $1.25 per acre, given him by that law, is this suit in the Court of Claims. We, therefore, think it plain that not only did the court below have jurisdiction of this action, as an implied contract for the repayment of this money, but as of a claim founded upon a law of Congress.

The jurisdiction of the Court of Claims covers all claims against the United States arising *ex contractu* or founded on any law of Congress.

On page 2 of the brief for the Government Section 3 of chapter 227 of the laws of 1880 (21 Stat., p. 238) is quoted. This statute established the price of certain agricultural public lands which were reserved to the United States within grants to railroads and the price of which by reason of such grant was raised to $2.50 per acre prior to January, 1861, and which were not sold June 15, 1880, at $1.25 per acre. These lands were surveyed, located, and identified by maps in the Land Office, so that the Secretary of the Interior, Commissioner of the General Land Office and the Registers and Receivers at the local land offices had perfect knowledge as to the fact that the price thereof fixed by law was $1.25 per acre and not $2.50 per acre. These lands could not be sold for $2.50 per acre, unless all these officers ordained such sales in plain violation of law. Such sales were ordered and made in the State of Wisconsin by the exaction of all these officers in violation of law and an aggregate sum of $12,000 in excess of the price fixed by law was extorted from persons entitled to purchase the lands at $1.25 per acre. As is well known, the Secretary of the Interior at a later date admitted these charges of $2.50 per acre to have been erroneously made and that the excess whenever the Secretary of the Interior had power to do so should be returned (see case of Albert Nelson, 28 P. L. D., p. 248). But it was also held that the act of June 16, 1880, did not authorize the Secretary of the Interior to draw his warrant on the Treasury in repayment of such cases. In one of these cases, that of Partelow Miles, in which the Court of Claims entered a judgment for the excess of $100, it appeared that at first only $1.25 per acre was exacted, which was paid. Afterwards from Washington the local land officers were ordered to exact of him another $1.25 per acre.

This demand was enforced in spite of his earnest protests. Thus the fact is publicly known that all these payments of the excess of $1.25 per acre were exacted from Washington. Each purchaser had the alternative presented to him of compliance with this demand or suffer a loss of the house he had built and the improvements he had made and of the home he had secured under the laws of the United States. On the part of the sufferer, any controversy or dispute with the officers he had to deal with but endangered the loss of his property, for they had the power to deny or cancel the entry he had made and give his home to another.

The statute of June 15, 1880, is an unconditional contract made by Congress with each citizen entitled to enter the described lands that he should have a patent for the land upon payment of $1.25 per acre therefor, and by force of this contract every dollar exacted and received of that citizen in excess of that price does not belong to the Government of the United States at all, but, on the contrary, it is a trust fund belonging to the citizen of whom it was wrongfully exacted and received. It is the law and not the officers of the Land Office that gives titles to public lands and that gives title to the United States to the purchase money received for such lands. These officers can not repeal, change or override these laws. If they attempt to do this, the courts having jurisdiction will enforce these laws. It is absurd to deny that the courts have jurisdiction for that purpose in all such cases. These officers can not sell the title to public lands for less or more than the price at which Congress has ordered such titles to be sold. A citizen who under the laws enters public lands by settlement and improvement for a home in order to subsequently purchase the same has but one remedy if the all-powerful officers who have supervision of such sales exact a price greater than that fixed by law.

That remedy is to pay the price demanded and recover the amount of the unlawful charge in the courts. In this connection the fact ought to be noted that by reason of having custody of all maps and records, and being charged with the duty of faithfully executing the laws, the applicant purchaser would be easily imposed upon and defrauded if the officer asserted the price of lands to be $2.50 per acre when in fact the law made the price $1.25 per acre. As to these cases the fact is patent that such representations were made and upon such representations the excess charged was secured.

In this case the alternative by the officers of the land office was presented to the appellee—to pay the $2.50 per acre for the land, the price of which was fixed by law at $1.25 per acre, or abandon his house and home. How can this be erected into a voluntary payment of money, in excess of the price fixed by law, so as to give the Government of the United States title to the money unlawfully charged? This claim arises *ex contractu* and is also founded on a law of Congress.

We have shown, therefore, 1. That appellee was required to pay $2.50 per acre by the officers of the Land Office, instead of $1.25 per acre which is now admitted to have been the legal price.

2. That this payment was made under compulsion in order to save, not only his right to the land under the pre-emption law, but the buildings and improvements he had put upon the land.

3. That the decisions of this court and of inferior courts are to the effect that a payment made under such circumstances is made under compulsion, and that a protest is not necessary.

4. That the Department of the Interior has held in its published decisions that such overcharges, when made, are exactions or charges made by its officers, and that

where erroneous they should be repaid; and that it has repaid such overcharges where it has found legal authority to draw its warrant on the treasury for this purpose.

5. That the Department in the Nelson case caused to be repaid the overcharge in a case exactly similar to this where it found itself possessed of the authority to do so.

6. That the Court of Claims has undoubtedly jurisdiction to render the judgment in this case.

It is submitted, therefore, that the judgment of the Court of Claims in favor of the appellee was correct and that it should be affirmed by the Court.

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